

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

HYUN JU LEE,
Defendant/Petitioner.

No. CR-02-221-FVS

ORDER DENYING PETITION
FOR A WRIT OF CORAM NOBIS

THIS MATTER came before the Court on January 27, 2012, for an evidentiary hearing. The Court reserved ruling at the conclusion of the hearing. On February 10, 2012, the Court ruled orally via a telephone conference call. On both January 27th and February 10th, the defendant was represented by Jeffry K. Finer and the government was represented by Russell E. Smoot. This order serves to memorialize the Court's oral ruling on February 10th.

FINDINGS OF FACT

1. On August 6, 2002, Hyun Ju Lee was charged by Indictment with the crime of distribution of pseudoephedrine. 21 U.S.C. § 841(c)(2).

2. On September 3, 2002, attorney Bevan Maxey became Ms. Lee's counsel of record.

3. On September 19, 2002, attorney Jerry L. Kagele filed a notice indicating he was associating with Mr. Maxey in the representation of

1 Ms. Lee. Mr. Kagele's role was to advise Ms. Lee concerning
2 immigration law.

3 4. On October 30, 2002, the government filed an Information
4 Superseding Indictment that charged Ms. Lee with the crime of using a
5 communication device in order to facilitate the commission of a
6 federal drug crime. 21 U.S.C. § 843(b). She pleaded guilty that same
7 day pursuant to a written plea agreement that was explained to her
8 with the assistance of an interpreter. The plea agreement is silent
9 with respect to whether her guilty plea would lead to her removal from
10 the United States. Nor did the Court discuss removal with her when
11 she pleaded guilty.

12 5. On April 18, 2003, attorney Mark E. Vovos took Mr. Maxey's
13 place as her attorney.

14 6. On July 17, 2003, Mr. Kagele's license to practice law was
15 suspended by the Supreme Court of the State of Washington. He
16 withdrew as associate counsel on July 28th. His withdrawal left Mr.
17 Vovos as Ms. Lee's sole attorney.

18 7. On September 2, 2003, Mr. Vovos filed a motion for downward
19 departure. His supporting memorandum stated in part, "The attorney
20 that [Ms. Lee] . . . hired as her 'immigration lawyer' has been
21 suspended from the practice of law and she faces the imminent removal
22 from this country if sentenced by the terms of the plea agreement."
23 Memorandum of Authorities (ECF No. 57-1) at 1-2.

24 8. On January 9, 2004, Ms. Lee was sentenced. During the
25 hearing, Mr. Vovos made two comments about her risk of removal from

1 the United States. At one point, he said:

2 Unfortunately . . . the circumstance she is facing, as far
3 as a penalty, a more serious consequence in this than anyone
4 else, because she is facing directly a deportation and
5 removal proceedings to a place where she has no family at
6 all. What will happen there, I guess we can only predict by
7 lawyers.

8 Transcript of Sentencing Hearing (ECF No. 67) at 19. Later, he said,
9 "The real vice, something, unfortunate, you have nothing to do with,
10 and that's whatever is going to happen with Immigration. And whatever
11 happens with her, I guess we'll have to deal with that, if and when we
12 can." *Id.* at 23.

13 9. The Court ordered Ms. Lee to serve 24 months probation. She
14 completed her sentence without incident.

15 10. During 2010, she applied for United States citizenship. Her
16 application triggered a review of her criminal history by an agency of
17 the Executive Branch. The agency discovered her 2004 conviction.
18 Removal proceedings were initiated. They are pending at this time.

19 11. On April 1, 2011, Ms. Lee filed a motion to vacate her
20 conviction and sentence. 28 U.S.C. § 2255. She asked the Court to
21 treat her § 2255 motion as a petition for a writ of coram nobis if she
22 is ineligible for relief under § 2255.

23 12. On August 22, 2011, the Court determined she is ineligible
24 for relief under § 2255 because she is not in custody. At the same
25 time, the Court concluded she is potentially eligible for a writ of
coram nobis.

26 13. On January 27, 2012, the Court held an evidentiary hearing.

1 14. Mr. Kagele is dead. Both Mr. Maxey and Mr. Vovos were
2 available to testify. Neither party chose to present testimony from
3 either attorney.

4 15. Although Ms. Lee attempted to testify truthfully at the
5 evidentiary hearing, time has taken its toll on her memory. The Court
6 finds her account of her discussions with her attorneys is neither
7 complete nor entirely accurate.

8 16. The Court finds Mr. Kagele did not clearly advise her she
9 would be removed from the United States if she pleaded guilty to the
10 crime of using a communication device in order to facilitate the
11 commission of a federal drug crime.

12 17. Ms. Lee would not have accepted the plea agreement that was
13 offered by the government had she clearly understood a plea of guilty
14 would result in her removal from the United States.

15 18. Ms. Lee discussed removal with Mr. Vovos, but, as the record
16 now stands, the Court cannot determine the substance of their
17 discussion.

19 **CONCLUSIONS OF LAW**

20 1. In order to qualify for coram nobis relief, Ms. Lee must
21 demonstrate "(1) a more usual remedy is not available; (2) valid
22 reasons exist for not attacking the conviction earlier; (3) adverse
23 consequences exist from the conviction sufficient to satisfy the case
24 or controversy requirement of Article III; and (4) the error is of the
25 most fundamental character." *United States v. Kwan*, 407 F.3d 1005,
26 1011 (9th Cir.2005) (internal citation omitted), abrogated on other

1 grounds by *Padilla v. Kentucky*, --- U.S. ----, 130 S.Ct. 1473, 176
 2 L.Ed.2d 284 (2010).

3 2. Since Ms. Lee is not in custody, she is ineligible for relief
 4 under 28 U.S.C. § 2255. Thus, the only method by which she may seek
 5 to vacate the 2004 judgment is by petitioning for a writ of coram
 6 nobis.

7 3. Ms. Lee saw no need to go to the trouble and expense of
 8 challenging her 2004 conviction until the Executive Branch instituted
 9 removal proceedings. Depending upon what Mr. Vovos told her about
 10 removal, this appears to have been a reasonable attitude for someone
 11 in her circumstances.

12 4. Ms. Lee likely will be removed from the United States if coram
 13 nobis relief is denied.

14 5. Ms. Lee argues a writ of coram nobis is necessary to correct
 15 an error of the most fundamental character; namely, that Mr. Kagele
 16 deprived her of her Sixth Amendment right to effective assistance of
 17 counsel.¹

18 6. In order to prove a Sixth Amendment violation, Ms. Lee must
 19 demonstrate both that Mr. Kagele's performance was deficient and that
 20 she suffered prejudice as a result. *Strickland v. Washington*, 466
 21 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

22 7. In *Padilla v. Kentucky*, --- U.S. ----, ----, 130 S.Ct. 1473,
 23 1486, 176 L.Ed.2d 284 (2010), the Supreme Court held "that counsel

24 25
 26 1Ms. Lee "has no claims against Mr. Maxey whatsoever as to
 any kind of failure." (Transcript of Evidentiary Hearing at ____.)

1 must inform her client whether his plea carries a risk of
2 deportation."

3 8. Mr. Kagele's advice to Ms. Lee fell short of that standard.

4 9. Ms. Lee suffered prejudice from Mr. Kagele's failure to
5 satisfy the *Padilla* rule in that she would not have accepted the plea
6 agreement that was offered by the government had she clearly
7 understood a plea of guilty would result in her removal from the
8 United States.

9 10. Ms. Lee's conviction became final before the Supreme Court's
10 decision in *Padilla*.

11 11. In order to invoke the *Padilla* rule, Ms. Lee must show it
12 applies retroactively to her case. Whether *Padilla* applies
13 retroactively depends, in large part, upon whether it is an "old rule"
14 or a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288,
15 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). If it is an old rule, Ms. Lee
16 may rely upon it to attack her conviction. See *Whorton v. Bockting*,
17 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007). If it is a
18 new rule, she may not rely upon it unless it qualifies as a "watershed
19 rule of criminal procedure." *Id.* at 417, 127 S.Ct. 1173 (internal
20 punctuation and citations omitted).

22 12. At least three circuit courts have considered whether *Padilla*
23 represents an old rule or a new rule. They have reached inconsistent
24 conclusions. Compare *United States v. Orocio*, 645 F.3d 630, 641 (3d
25 Cir.2011) (old rule) with *Chaidez v. United States*, 655 F.3d 684, 689
26 (7th Cir.2011) (new rule) and *United States v. Chang Hong*, No-10-6294,

1 2011 WL 3805763 at *7, *9-*10 (10th Cir. Aug. 30, 2011) (same). The
2 Ninth Circuit has yet to address the issue.

3 13. Both the Seventh and Tenth Circuits acknowledged that *Padilla*
4 did not overturn any precedent, that its holding was an application of
5 *Strickland*'s teaching regarding effective assistance of counsel, *Hong*,
6 2011 WL 3805763 at *7, *Chaidez*, 655 F.3d at 692-93, and that, as a
7 general rule, "the application of *Strickland* to unique facts generally
8 will not produce a new rule." *Chaidez*, 655 F.3d at 692. Nevertheless,
9 both the Seventh and the Tenth Circuits concluded *Padilla* announced a
10 new rule. In reaching that conclusion, they cited several
11 circumstances: the members of the *Padilla* court disagreed sharply
12 among themselves with respect to whether the holding was supported by
13 precedent, *Hong*, 2011 WL 3805763 at *6; *Chaidez*, 655 F.3d at 689-90;
14 lower federal courts had unanimously rejected the proposition that a
15 defense attorney has a duty to initiate a discussion of the issue of
16 removal with a foreign client who is contemplating a plea of guilty to
17 a crime, *Hong*, 2011 WL 3805763 at *6-*7, *Chaidez*, 655 F.3d at 690-91;
18 and application of the *Padilla* rule will depend heavily upon the facts
19 of the case, *Chaidez*, 655 F.3d at 693.

20 21 14. This Court agrees with the reasoning of the Seventh and Tenth
22 Circuits. *Padilla* is a new rule.

23 15. "Even a new rule may be applied retroactively if the rule is
24 substantive or if it is a watershed rule." *Ponce v. Felker*, 606 F.3d
25 596, 604 (9th Cir.2010). Neither exception applies here.

26 16. *Padilla* is a procedural rule, not a substantive rule. *Hong*,

1 2011 WL 3805763 at *8.

2 17. The only issue, then, is whether *Padilla* represents a
3 "watershed" rule. In order to qualify, the *Padilla* rule "(1) 'must be
4 necessary to prevent an impermissibly large risk of an inaccurate
5 conviction,' and (2) 'must alter our understanding of the bedrock
6 procedural elements essential to the fairness of a
7 proceeding.'" *Hong*, 2011 WL 3805763 at *8 (quoting *Whorton*, 549 U.S.
8 at 418, 127 S.Ct. 1173). As the Tenth Circuit explained in *Hong*, the
9 *Padilla* rule does not satisfy those requirements. *Hong*, 2011 WL
10 3805763 at *8-*10.

11 18. In conclusion, the rule set forth in *Padilla* does not apply
12 to Ms. Lee's case.

13 **IT IS HEREBY ORDERED:**

14 Hyun Ju Lee's petition for a writ of coram nobis (**ECF No. 75**) is
15 **denied.**

16 **IT IS SO ORDERED.** The District Court Executive is hereby
17 directed to enter this order and furnish copies to counsel.

18 **DATED** this 28th day of February, 2012.

19
20

s/ Fred Van Sickle
21 Fred Van Sickle
22 Senior United States District Judge
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